85-336

Supreme Court, U.S.
FILED
AUG 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

WILLIAM L. EUBANKS, JR.,
Petitioner,

v.

RICHARD E. O'BRIEN and
ECON-O-PLACER, INC.,
a Colorado corporation,
Respondents.

ON WRIT OF CERTIORARI TO THE
COLORADO COURT OF APPEALS

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Question Presented.

Does a court obtain in personam jurisdiction over a non-resident, natural person who is personally served with process while within the forum state at his own volition?

STATEMENT OF THE CASE

Plaintiffs-Respondents Richard E. O'Brien (incorrectly designated Richard "F." O'Brien by Petitioner) (hereinafter "O'Brien") and Econ-O-Placer, Inc. (hereinafter "Econ-O-Placer") commenced an action in Colorado against Defendant-Petitioner William L. Eubanks, Jr. (hereinafter "Eubanks") and Kemco Industries, Inc. (hereinafter "Kemco"). The claim arose when Eubanks and Kemco, who are Texas residents, failed to provide O'Brien with good title to certain equipment, in breach of a contract, and repossessed some of the equipment in violation of both Texas statute and the contract.

O'Brien is a resident of Colorado, and Econ-O-Placer is a Colorado corporation. Eubanks was personally served with the Summons and Complaint on

January 12, 1983, in Grand County, Colorado, for himself and on behalf of Kemco as its president. Eubanks and Kemco failed to file an Answer or other responsive pleading, and default was entered against them on February 7, 1983, pursuant to Colorado Rules of Civil Procedure (hereinafter "C.R.C.P.") Rule 55(a). The text of Rule 55 is printed in the Petition for Writ of Certiorari (hereinafter "Petition") at A12.

Eubanks and Kemco took no action whatsoever in the matter until May 31, 1983, when they filed Motions to vacate the default and quash service of process. Following a full hearing, their Motions were denied. The trial court entered default judgment against Eubanks and Kemco on September 9, 1983, pursuant to C.R.C.P. Rule 55(b)(2). Petition at A12-A13.

Thereafter, the Colorado Court of Appeals affirmed the judgment against Eubanks. The default judgment against Kemco was vacated due to insufficient contacts with the state of Colorado. Eubanks's Petition for Writ of Certiorari to the Colorado Supreme Court was subsequently denied.

SUMMARY OF THE ARGUMENT

Eubanks has not established any special reasons for granting review on Writ of Certiorari. The basic means recognized by this Court for obtaining personal jurisdiction is through service of process upon a natural person within the forum, and that rule should not be overturned.

Decisions of this Court which require minimum contacts with respect to substituted service and service on

corporations have not altered the fundamental rule regarding natural persons. Those lower courts which have considered the issue of jurisdiction over natural persons served while temporarily within the forum have all determined that the Due Process Clause of the Fourteenth Amendment does not prohibit a finding of jurisdiction.

The forum state has an interest in redressing wrongs done to its residents. Moreover, a person is presumed to know he will be subject to the jurisdiction of the courts when he voluntarily travels to a state. Principles of fairness preclude denying jurisdiction to the courts of plaintiff's residence when an individual defendant is served in that state.

ARGUMENT

I. EUBANKS HAS NOT ESTABLISHED ANY SPECIAL OR IMPORTANT REASONS FOR GRANTING REVIEW ON WRIT OF CERTIORARI.

A Petition for Writ of Certiorari will not be granted unless "there are special and important reasons therefor." Sup. Ct. R. 17.1. Of the considerations set forth in Rule 17, none is applicable to the facts of this case. Eubanks alleges that the Colorado Court of Appeals decided an important question of federal law not previously settled by this Court, i.e., that service of process on Eubanks within Colorado did not confer personal jurisdiction over him. His contention is in error; that issue was settled over 100 years ago.

A. The Basic Method Of Acquiring Jurisdiction Is Through Personal Service Upon A Defendant In The Forum.

The axiom which forms the basis for personal jurisdiction in the United States is that the presence of a person and service upon him within a state confer jurisdiction upon the courts of that state. In Pennoyer v. Neff, 95 U.S. 714 (1878), this Court formally stated that principle and cited at length from earlier opinions which followed the rule. 95 U.S. at 720-22. The Pennoyer Court quoted from Mr. Justice Storey's opinion in Picquet v. Swan, 5 Mass. 35 (1809): "Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him." 95 U.S. at 724. In discussing requirements of the

Due Process Clause of the Fourteenth Amendment, the Court reiterated that to establish personal liability of a defendant, "he must be brought within its jurisdiction by service of process within the State . . . ." 95 U.S. at 733.

Subsequent decisions of this Court have affirmed that the basis of jurisdiction is personal service upon a defendant within the forum state. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), this Court noted: "Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding." 339 U.S. at 313. The Mullane Court also pointed out that due process requires only that notice reasonably calculated to apprise the defendant of the pendency of the action

and give him an opportunity to present his objections. Id. at 314. Clearly, personal service within the jurisdiction accomplishes those goals.

B. Subsequent Supreme Court Cases Have Not Altered The Fundamental Rule For Otaining Jurisdiction Over Natural Persons.

Eubanks bases his contention that this long-standing rule should be overturned upon his interpretation of the "minimum contacts" rule of International Shoe Co. v. Washington, 326 U.S. 310 (1945). However, Eubanks misreads International Shoe. That decision merely held: "[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it . . . ." 326 U.S. at 316 (emphasis supplied).

International Shoe simply established requirements for asserting jurisdiction over the legal fiction of a foreign corporation, and International Shoe's progeny otherwise clarified the court's power in cases not involving a natural person served in the forum. None of those cases would have been necessary had the facts involved the cornerstone of jurisdiction, i.e., actual presence. The minimum contacts theory is utilized solely to determine jurisdiction where the defendant is a corporation or is served by substituted service.

In Shaffer v. Heitner, 433 U.S. 186 (1977), this Court applied the minimum contacts rule to cases concerning quasi in rem jurisdiction in which the litigation was unrelated to the non-resident defendant's property that

served as a basis for jurisdiction. 433 U.S. at 208-09. Significantly, the defendants in Shaffer were served by substituted service. Id. at 192.

Contrary to Eubanks's assertion, the rule set forth in Pennoyer was not mere dicta. The Pennoyer Court's lengthy review of prior cases, together with subsequent decisions of this Court, firmly establishes the basis for jurisdiction upon which the Colorado Court of Appeals rendered its decision in the case at bar. The long-standing "presence rule" remains valid and should not be overturned by this Court.

C. All Lower Courts Which Have Considered The Issue Have Upheld Jurisdiction.

None of the lower courts which have considered the issue in the case at bar have held that service of process upon a

natural person within the state, no matter how short the duration of his stay, deprives him of due process.

A number of cases following Shaffer ruled that the limited holding in Shaffer, i.e., that the mere presence of defendants' property within the forum state was insufficient to confer personal jurisdiction over defendants served by substituted process, was both irrelevant and unpersuasive with respect to natural persons served within the forum state.

Jurisdiction was upheld where a defendant was personally served while temporarily in the state to bowl. Humphrey v. Langford, 246 Ga. 732, 273 S.E.2d 22, 24 (1980). In a well-reasoned opinion, the Humphrey Court found minimum contacts analysis unnecessary when an individual is personally served within the state, for the reason that the rule

of minimum contacts is used only as an alternative to presence when dealing with the fiction of a corporation. 273 S.E.2d at 23. Although Shaffer and other subsequent cases contained broad, general language about the minimum contacts rule, the Court noted that those cases involved defendants not personally served within the jurisdicton. Id. at 23-24. A number of compelling reasons to uphold jurisdiction were found, including that a person served within a state is there of his own volition, and by his actions chooses where the case will be brought. Moreover, a party who enters a jurisdiction is required to abide by the laws of the state and is protected by those laws; accepting the benefits while avoiding the responsibilities would create an unacceptable imbalance in favor of the defendant. Id. at 24.

Two decisions in the United States District Court for the Southern District of New York also upheld jurisdiction under similar circumstances. Personal service upon defendants while temporarily at a New York City airport was found sufficient to establish in personam jurisdiction in Aluminal Industries, Inc. v. Newtown Commercial Associates, 89 F.R.D. 326 (S.D.N.Y. 1980). That Court stated: "It has long been black letter law that personal service within its geographical area establishes a court's personal jurisdiction over the defendant." Id. at 329 (quoting Restatement (Second) of Conflicts of Laws, Section 28 (1969)). The Aluminal Industries Court found defendants' reliance upon Shaffer misplaced in that Shaffer did not affect principles regarding personal jurisdiction

within the forum. 89 F.R.D. at 329. In Opert v. Schmid, 535 F. Supp. 591 (S.D.N.Y. 1982), the Court also found the Shaffer argument unpersuasive where a defendant was personally served while temporarily in New York to attend a car race. Id. at 593.

Finally, in Ruggieri v. General Well Services, Inc., 535 F. Supp. 525 (D. Colo. 1982), the Court thoroughly analyzed all means of obtaining personal jurisdiction. The starting point of the analysis was the "presence rule": If a defendant physically within the forum state is personally served, he is subject to the personal jurisdiction of the courts of that state, no matter how fortuitous his presence may be. Id. at 529.

In a case decided before Shaffer, the Supreme Court of Minnesota upheld jurisdiction over a defendant personally served while in the forum state for lunch. Nielsen v. Braland, 264 Minn. 481, 119 N.W.2d 737, 738 (1963). The Nielsen Court reasoned that International Shoe and its progeny relate only to substituted service upon a defendant, not personal service on an individual. Id. In Donald Manter Co., Inc. v. Davis, 543 F.2d 419 (1st. Cir. 1976), the United States Court of Appeals for the First Circuit also refused to overturn the long-established principle that personal service within a geographical area establishes the court's jurisdiction. The Court pointed out that the suggestion that presence within the jurisdiction is insufficient has been advanced by commentators but is totally unsupported

by any judicial authority. Id. at 420. In an earlier oft-cited case, jurisdiction over a defendant served while in an aircraft flying over the state was found proper. Grace v. MacArthur, 170 F. Supp. 442, 444 (E.D. Ark. 1959).

II. THE FOURTEENTH AMENDMENT DOES NOT REQUIRE THAT THIS COURT OVERRULE SETTLED PRINCIPLES OF PERSONAL JURISDICTION.

Eubanks asks this Court to overturn a fundamental principle established by this Court and upheld by every lower court which has considered the matter, but Eubanks fails to cite any recognized authority or present any cogent reasons for so doing. In fact, no case exists which supports Eubanks's position; he has been able to cite only tertiary sources which have never been relied upon as precedent by the courts.

If a natural defendant is personally served within the territory of the forum, such manner of service and notification of the lawsuit does not offend the "traditional notions of fair play and substantial justice" of International Shoe Co. See 326 U.S. at 316. As Mr. Justice Stevens stated in his concurrence in Shaffer: "I would also not read [Shaffer] as invalidating other long-accepted methods of acquiring jurisdiction over persons with adequate notice of both the particular controversy and the fact that their local activities might subject them to suit." 433 U.S. at 219.

In the case at bar, Eubanks has not denied, nor could he deny, that he had adequate notice of the controversy between him and the Respondents. The dispute was of several months standing when Eubanks

arrived in Colorado. He is thus presumed to have "knowingly assume[d] some risk" that by entering the state of Colorado, Colorado could exercise its power over him while there. See Shaffer v. Heitner, 433 U.S. at 218 (Stevens, J., concurring). Eubanks's conduct in voluntarily traveling to and remaining in Colorado is clearly such that "he should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Moreover, by entering Colorado, Eubanks became eligible to petition the Colorado courts for redress if, for example, he were injured in Colorado while skiing. Fairness dictates that he be subject to the jurisdiction of the Colorado courts with respect to claims against him as well.

Eubanks argues that a visitor to a state could assume the risk of being subject to the court's power only if he were aware that jurisdiction could be established by his mere presence. However, it is presumed that citizens have knowledge of the laws; while that may be a legal fiction, it nevertheless remains a fundamental precept. Moreover, simple logic dictates that a person who enters another state will be subject to its laws and to the jurisdiction of its courts.

The arguments propounded by Eubanks and the commentators he cites ignore that a resident plaintiff has rights which need to be protected as much as a nonresident defendant's. A plaintiff normally may choose the forum, and if the defendant subjects himself to the jurisdiction, the defendant offers the plaintiff a choice of jurisdiction as well. Furthermore,

considering the breadth of knowledge and sophistication of courts today, it cannot be presumed that the courts in a plaintiff's state are incapable of rendering justice between litigants or that they cannot apply the law of the defendant's state, if that should prove necessary. Moreover, defendants often attempt to avoid personal service, and if they cannot be sued where they are found, they may avoid suit entirely. The rule as it stands also has the commendable advantage of being predictable and one upon which the parties may rely. In addition, considerations of fairness should preclude requiring that an in personam action be brought in the state of the defendant's residence to the exclusion of the plaintiff's. Donald Manter Co., Inc. v. Davis, 543 F.2d at 20. Assuming, arguendo, that minimum contacts analysis were relevant, it has been suggested that

personal presence in a state per se fulfills the minimum contacts requirement. Humphrey v. Langford, 273 S.E.2d at 23.

Eubanks is mistaken in asserting that Colorado has no connection to the controversy. Colorado is the residence of O'Brien and Econ-O-Placer and consequently has an interest in providing a forum for its citizens to air their grievances. Other factors connecting this action with Colorado are, no doubt, correspondence and telephone calls from and to O'Brien in Colorado. Presumably, evidence and witnesses favorable to O'Brien and Econ-O-Placer would be available in Colorado, and Respondents would incur a hardship were they forced to litigate the matter in Texas.

Significantly, the Petition glosses over the substance of this case: that Eubanks entered Colorado voluntarily and

chose to disregard completely the Summons and Complaint which were served upon him for over four and one-half months.

Eubanks raises an additional issue, that of equal protection, in asserting that it is unfair to uphold jurisdiction over him while denying jurisdiction with respect to Kemco. Petition at 17. This argument was not presented to either the trial court or the Colorado Court of Appeals and therefore cannot be considered by this Court.

The concern of this Court in recent years has been with expanding jurisdiction, rather than contracting it. Donald Manter Co., Inc. v. Davis, 543 F.2d at 420. For example, in Calder v. Jones, ___ U.S. ___, 104 S. Ct. 1482 (1984), this Court upheld the exercise of long-arm jurisdiction upon defendants whose actions entirely within Florida caused

injury to the plaintiff in California. Id. at 1488. The fundamental basis of jurisdiction, presence of the defendant within the state, has been expanded by the use of long-arm statutes and other means for obtaining jurisdiction over corporate entities. Nothing in Shaffer or subsequent cases indicates that states cannot constitutionally exercise their power over persons found within their borders. The Due Process Clause of the Fourteenth Amendment contains no such requirement, and thus no reason exists to grant the Petition.

CONCLUSION

For all of the above reasons, Eubanks has failed to establish any special and important reasons for granting review on Writ of Certiorari and for overturning

fundamental principles of *in personam* jurisdiction. O'Brien and Econ-O-Placer therefore respectfully request that the Court deny the Petition.

Dated this 28th day of August, 1985.

Respectfully submitted,

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